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Among the interesting papers read at the recent meeting of the Ohio State Bar Association, is one by C. C. Cook, Esq., of Cincinnati, on "Pardons and Criminals," which is especially deserving of study and consideration by law reformers. Its aim is to point out serious defects in the law relating to the pardoning of prisoners by executive authority, and to suggest remedies for the abuses which have grown up out of the arbitrary and unrestrained power to pardon offenders. Though especially applicable to Ohio and the condition of the law there, the suggestions of Mr. Cook and the reform which he urges have value and force in many others of the States, where, as in Ohio, the constitutional prerogative of the governor to pardon criminals is without any restriction whatever. Two remedies are suggested, either of which would be more satisfactory in practice than the present. Either vest in trial courts the power to recommend to the governor clemency to criminals, or else take from the executive officer the constitutional right to extend clemency and create a court of criminal appeal, invested with the exclusive power to extend clemency to convicts. In our judgment, the reform advocated is urgently needed. The wild and reckless use of the arbitrary power to pardon convicts, has in many of the States, become a crying evil. Political influence and personal favoritism play no insignificant part ofttimes in the exercise of this most important trust. It is to be hoped that legislators will give the subject the consideration it deserves.

In the case of H. Clay King who was recently sentenced to death in Memphis for the murder of David H. Posten, two interesting questions were raised and decided adversely to the defendant on a motion for a new trial. Both of these questions related to acts of alleged misconduct on the part of the jury. Before the jury had agreed upon their verdict they were permitted to take a trip on a steamboat, across the Mississippi river from Tennessee into Arkansas. After they crossed the border line and entered Arkansas they were, of course, outside the jurisdiction in which the crime was committed, and in which alone their action could have any effect. It was argued by counsel for the prisoner that by reason of this journey outside the State limits the jury lost all further right to act in the case; but the court overruled the objection, and held that inasmuch as the trip was made merely to give the jurymen exercise and fresh air, the jury being all the while in the charge of the sheriff, no harm was done to the prisoner, and the jury were not divested of their power to render a valid verdict.

The practice of allowing jurors to go out of the State while they have a capital case under consideration, even under the most careful supervision, is obviously dangerous and cannot be commended. It seems to us by no means certain that it would not be fatal to a verdict if the proof were clear that the jury actually discussed the case while they were in or upon the territory of the neighboring State for, in that event, the trial, in part at least, would be conducted outside the proper jurisdiction. There seems no good reason, however, why the mere transportation of the jury into another State, at a time when they have a case under consideration should have this effect if it is clear that they did not discuss the evidence, or deliberate as a body during their absence.

The other objection to the verdict grew out of the fact that a number of the jurymen drank whisky in the course of the trial without a physician's order, or the consent of the court. This objection was overruled on the ground that it did not appear that the drinking in any instance was excessive.

On the subject of the unauthorized use of ardent spirits by jurors, the courts of different States have differed widely; but the decision in Tennessee is sustained by precedents in that State and by very respectable authority elsewhere. Thus in a leading Illinois case the Supreme Court said: "The officer having charge of the jury permitting any member of them to drink spiritous liquors was certainly very culpable and would have been properly punishable by the court; but it is not such conduct as would vitiate a verdict." Similar decisions have been made by the courts of last resort in Mississippi and Virginia. On

the other hand in Texas it has been held that the drinking of ardent spirits by a jury while deliberating upon their verdict in a capital case constitutes cause for a new trial. "It would be dangerous in the extreme," said the court, "to attempt to lay down any rule by which it could or should be determined whether a juror had drank too much or not, and the only safe rule is to exclude it entirely."

The same rule has been adopted in Iowa and New Hampshire. In capital cases, at all events, it seems the safer and wiser rule.

NOTES OF RECENT DECISIONS.

WATER-COURSES— OBSTRUCTIONS — ACTION FOR DAMAGES.—In O'Connell v. East Tenn., Va. & Ga. Ry. Co., 13 S. E. Rep. 489, the Supreme Court of Georgia decide that when a railway company erects an embankment for its track along the margin of a river, the accumulated waters of which, in times of flood, had previously escaped on that side, it being lower than the other, but which thereafter, and because of the embankment, overflowed the opposite side more than it had done before, and thus injured the land there situate, the owner has a right of action against the company; or if, by the erection of such embankment, the river was deflected from its natural course, or deposits were made therein so as to raise its bottom, and from either of these causes such land was injured by the river when swollen, a recovery may be had for the damages thereby occasioned. Upon the main question, Lumpkin, J., says:

The precise question in this case is whether the owner of land on the bank of a river can without liability erect on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor, to the injury thereof; or is there any duty for each owner to receive upon his land the share allotted it by nature of the flood-waters of the river. It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is surface water, against which, by the common law, a man may protect himself without regard to the consequences to his neighbor. Many cases cited by him make a distinction between the common law and the civil law as to surface water; the former allowing the land-owner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement. There is authority to show that there is no difference between the common and the civil law in this respect, but that the common follows the civil law. Gillham v. Railroad Co., 49 Ill. 484; Gormley v. Sanford, 52 Ill. 158; and the able opinion in Boyd v. Conklin, 54 Mich. 583, 20 N. W. Rep. 595. There is much conflict in the American cases (Washb. Easem. p. 485, *353, *et seq.*), the majority of the States seeming to follow the so-called "civil law rule." Thus it is material to consider whether the overflow, as above stated, is properly classed with surface water. This depends upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood-water becomes severed from the main current, or leaves the stream, never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water-course. So, on the other hand, it may have a "flood channel," to retain the surplus waters until they can be discharged by the natural flow. The low places on a river act as natural safety-valves in times of freshet; and the defendant claims the right to stop up one of these without liability for ensuing damage.

The English cases on the question are not numerous, though from the decisions and *dicta* of the judges the law appears to be well understood and settled. In Rex v. Commissioners, etc., of Pagham, 8 Barn. & C. 355, it was held that an owner of land on the seashore could erect works to protect his land from encroachments by the sea, without liability for damage inflicted on his neighbor. The sea was called a "common enemy," against which each might fortify at will. It appeared in Rex v. Trafford, 1 Barn. & Adol. 874, that a canal had been built by authority of parliament, and carried across a river and the adjoining valley by means of an aqueduct and an embankment containing several arches. A brook fell into the river above its point of intersection with the canal. In times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, through the arches into the river, doing much mischief to the lands over which it passed. The aqueduct was sufficiently wide for the passage of the river at all times but those of high flood. The occupiers of the injured lands adjoining the river and brook, for the protection thereof, erected banks (called "fenders"), so as to prevent the flood-water from escaping; consequently the water, in time of flood, came down in so large a body against the aqueduct and canal as to endanger them, and obstruct the navigation. The fenders were not unnecessarily high, and without them many hundred acres of land would be exposed to inundation. It was held that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action would have lain at the suit of an individual; and, consequently, that an indictment lay where the act affected the public. The conviction was accordingly sustained. The doctrine of Rex v. Commissioners, etc., of Pagham, *supra*, was sought to be extended to this case, but Tenterden, C. J., who had rendered the decision in that case, said: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in

a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited or has been found that will support such a distinction, The Pagham Case * * * is of a very different kind. * * * In the one case the water is prevented from coming where, within time of memory at least, it never had come; in the other it is prevented from passing in the way in which, when the occasion happened, it had been always accustomed to pass." This seems to be an authoritative enunciation of the common law. Menzies v. Breadalbane, 3 Bligh (N. S.), 414, is directly in point, but was determined by the law of Scotland. Yet the lord chancellor said: "It is clear beyond the possibility of a doubt that by a law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a sort of new water-way, to the prejudice of the proprietor on the other side." In Attorney-General v. Earl of Lonsdale, L. R. 7 Eq. 387, 20 Law T. 64, it was attempted to extend the sea doctrine to the case of a tidal river, but Vice-Chancellor Malins refused to so extend it on the authority of Menzies v. Breadalbane, *supra*, saying that Lord Eldon put that case upon the general law of England. In Mason v. Railway Co., L. R. 6 Q. B. 581, we find a *dictum* by Blackburn, J., as follows: "Before the canal was made, the person whose estate the plaintiff now has, had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as that was a benefit—as, for instance, to turn his mill, or water his cattle: and he was bound to submit to receive the water, so far as it was a nuisance, as by its tendency to flood his lands." Lawrence v. Railroad Co., 4 Eng. Law & Eq. 265, 16 Q. B. 643, is considerably in point. A railway was constructed across certain low lands adjoining a river, over which the flood-waters used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway the flood-waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. It was held that an action would lie against the company for the injury. Patterson, J., said: "*Prima facie* this would give the plaintiff a cause of action, and the question is whether the company are protected by their act;" a question which cannot arise in our law. In connection with the cases of Rex v. Trafford and Lawrence v. Railway Co., *supra*, it must be borne in mind that the first obstruction of the flood waters there mentioned is, in England, justified by the statute authorizing it, and therefore stands on much the same footing as a natural obstruction; but the liability of the other party, who erected the second obstruction without statute authority, springs from the common law. No English authority has been found to controvert these principles, but the text-writers recognize them as settled law. Woolr. Waters, 213. (78 Law Lib. 212); Crabb. Real Prop. 420 (54 Law Lib. 263); Michael & W. Gas. & Water (London ed. 1884), pp. 213, 214, 666; Ang. Water-courses, §§ 333, 334; Gould, Waters, §§ 160, 209.

In grouping the American cases, those tending to sustain the contention of the defendant in error will first be stated. Taylor v. Fickas, 64 Ind. 167, was much relied upon. There the injury was caused by the obstruction of the passage of drift-wood, both owners being on the same side of the river, and the lower owner having planted a row of trees along the dividing line. The opinion, it is true, treats overflow in flood times as surface water, but it will be noticed that nothing is said or decided about changing the course of the water. The facts are obviously different from those in the present case. In Railroad Co. v. Stevens, 73 Ind. 278, the plaintiff's land was between the river and the railroad embankment. The overflow is treated as surface water, and the road held not liable; but it would seem that the water doing the damage had left the river, never to return. Turnpike Co. v. Green, 99 Ind. 205, follows the last case. The turnpike was flooded because of an embankment erected by Green to protect his land from overflow, both parties being on the same side. It was held that the company could not recover. But note that the court adverts to the fact that the company did not own the soil over the which the pike ran, but merely had an easement therein. McCormick v. Railroad Co., 57 Mo. 433, can also be distinguished. Here the overflowing water left the stream permanently, and entered a pond formed thereby and by other surface the water, the draining of which pond caused the injury sued for. In Shane v. Railroad Co., 71 Mo. 237, the overflow is apparently treated as surface water, although it had a way, through a slough, back into the stream. But the court applied the civil law, and held the railroad liable. This case together with that of McCormick v. Railroad Co., 70 Mo. 359, is overruled, in so far as the civil law was followed, by Abbott v. Railroad Co., 20 Amer. & Eng. R. Cas. 103, and the common law as to surface water returned to. In this last case it is said that the court in the Shane Case treated the overflow as part of the stream, and, therefore, that the decision was correct on common law principles. In the Abbott Case, the court expressly assumes the waters to be surface waters. It seems they escaped from the bed of the creek, and flowed over the lands without any return. Lamb v. Reclammation Dist. (Cal.) 14 Pac. Rep. 625, is not much in point. The defendant was a public corporation for the purpose of reclaiming the low lands protected by the embankment, which closed up a slough through which an inconsiderable part of the flood-waters escaped into a natural basin. The plaintiff's land lay two miles below, on the opposite side. The court applied the sea doctrine of the common law, and held the company not liable; but the decision is mainly rested on another ground, namely, that the corporation was not liable as for exercising the right of eminent domain; and in view also of the concurring opinions, the case is weak on the question involved in the case at bar. See below for an earlier decision by the same court looking another way, not noticed in the case above. In Hoard v. City of Des Moines, 62 Iowa, 326, 17 N. W. Rep. 527, the plaintiff's land was between the river and the embankment, and it was held that the plaintiff had no right to have the flood-waters from the river pass over his land onto that of another, although they finally joined the river again at a point further down. At first view, Moyer v. Railroad Co., 88 N. Y. 351, seems to support the defendant's position; but a close examination shows otherwise. The complaint averred that the damage was caused by the railroad building an embankment on the opposite side of the river. Evidence was offered and objected to, to show damage caused by raising the tracks. It was admitted: the railroad excepting. The referee included in his finding for the plaintiff the damages caused by raising the tracks, as to which the complaint alleged nothing:

thus tainting the whole finding with illegality. The judgment was reversed for the error in admitting said evidence and in said finding. The court say the defendant, as a matter of law, would not be liable for consequential damages caused by the raising of the embankment on the company's own land in a proper and workman-like manner; citing Bellinger v. Railroad, 23 N. Y. 47. This case bases the freedom from liability upon the legislative authority, but concedes that a private individual would be liable under the same conditions. In our law the railroad occupies no better position in this respect than the private individual.

Now will be stated the American cases going to show that the defendant is liable if it has erected the obstruction to the flood-waters of the river, as complained of in this case. The surplus waters do not cease to be part of the river when they spread over the adjacent low grounds, without well-defined banks or channel, so long as they form with it one body of water, eventually to be discharged through the channel proper. Thus it is held, where the waters of a stream disperse themselves over low ground, without any well-marked course, but gather up lower down into a defined channel, they are not surface water while in the dispersed state, and interference with them then gives the injured party a right of action. Macomber v. Godfrey, 108 Mass. 219; Gillett v. Johnson, 30 Conn. 180; Briscoe v. Drought, 11 Ir. C. L. 250; West v. Taylor, 16 Or. 165, 13 Pac. Rep. 665. But if it were conceded that the overflow is surface water, it would certainly cease to be such when turned back into the stream by the defendant's obstruction. Sullens v. Railroad Co., 74 Iowa, 659, 38 N. W. Rep. 545; Moore v. Same, 75 Iowa, 263, 39 N. W. Rep. 390; Jones v. Hannovan, 55 Mo. 462; Railroad Co. v. Archibald (Miss.), 7 South. Rep. 212. Under these authorities, this declaration might be sustained as complaining that the defendant prevented the flood-waters from becoming surface-water, and threw them back across the river upon plaintiff's land. See, further, as to surface water, 17 Cent. L. J. 42, 62; Ang. Water-courses, § 108a *et seq;* Gould, Waters, § 263 *et seq.* But it is not necessary to take this view, as the following authorities show the defendant to be liable under the alleged facts: Where the effect of the defendant's dike was to retain on the land of the plaintiff; flood-waters from the river longer than they would otherwise remain, the injury was held actionable, and the demurrer overruled, Montgomery v. Locke (Cal.), 11 Pac. Rep. 874. Where, in a freshet, the stream broke over one of its banks, carrying a part of it away, it was held that the owner might replace the bank with a dam, provided he did not build higher than the original bank, or otherwise cause the water to flow differently from the natural flow. Pierce v. Kinney, 59 Barb. 56. "It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank to prevent the stream washing the bank away, and overflowing and injuring his land. But in doing this he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go in ordinary floods. If he does, he will be liable for the injury." Wallace v. Drew, 59 Barb. 413. There is no distinction in principle or authority between obstructing the flow of a stream at its ordinary level and in time of flood. Burwell v. Hobson, 12 Grat. 322. This case is in point and holds the defendant liable. Another case in point is Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. Rep. 429, holding that flood-water is not surface water, and that interference therewith gives a right of action. So Byrne v. Railroad Co. (Minn.), 36 N. W. Rep. 339, holds that overflow in times of high water is not surface water, and the railroad is liable for obstruction of such water by an embankment erected on its own land. See, also, Rau v. Railroad Co., 13 Minn. 422 (Gil. 407), where the railroad made an extensive excavation on its own land, into which overflow waters from the Mississippi river entered, to the damage of an adjoining owner. The railroad was liable.

PLEDGE OF COLLATERALS—BANKS—RIGHTS OF PLEDGEE — WAIVER. — In Hallowell v. Blackstone Nat. Bank, 28 N. E. Rep. 281, decided by the Supreme Judicial Court of Massachusetts, a borrower at a bank gave his note and certain stock as collateral security. The note authorized the bank to sell the stock "on the non-performance of this promise, said bank applying the net proceeds to the payment of said note, and accounting to me for the surplus, if any;" and that "such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank." It did not appear that the borrower had had any other transactions individually with the bank. It was held that the bank was authorized to hold any excess of collaterals as security for bills accepted by a firm of which the borrower was a member. Part payment only of the note at maturity constituted non-performance, and an agreement not to press the demand without notice was not a waiver of the bank's right to sell the stock after notice was given. Holmes, J., says:

This is a bill to redeem certain stock given by one Smith, the plaintiff's insolvent, to the defendant as collateral security for a loan to Smith. The main question is, whether the defendant can hold the stock as security, not only for the loan mentioned, but also for two acceptances of a firm of which Smith was a member, which acceptances the defendant had discounted before the date of the loan in question. The note given by Smith for the loan authorizes the defendant to sell the stock "on the non-performance of this promise, said bank applying the net proceeds to the payment of this note, and accounting to me for the surplus, if any." It then goes on, and these are the important words, "and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank."

The counsel for the plaintiff based his argument on the proposition that the right to apply the excess of collaterals to any other note or claim was conditional upon Smith's non-performance of his promise. We think it doubtful at least whether that is the true construction of the words which we have quoted. We are disposed to read the agreement as an absolute pledge or mortgage of the securities for other notes and claims. But if this be not so, we are of opinion that Smith did not perform his promise within the

meaning of the note. The bank demanded payment of Smith on January 3, 1889, and he made partial payments, but failed to pay the residue and requested the bank to make the balance a time loan, which the bank refused. This was a non-performance of his promise by Smith. It is true that the report states that it was understood that the demand should not be pressed without further notice. But this did not take away the effect of the breach. It merely called on the bank to give notice before taking further steps, such as selling the security, and this it did. We neither construe the report as meaning, nor do we infer from it, that the breach of Smith's promise by his failure to pay on demand was waived by the bank. On January 3d, if not before, the bank's right vested to apply any excess of collaterals upon other claims.

The question remains whether the bank is entitled to hold the security for the bills, which were accepted by Smith's firm and not by him individually. It cannot be denied that the acceptances were "claims against him," and that the words used in his note were broad enough to embrace firm acceptances, unless there is some reason in the contract, the circumstances or mercantile practice to give them a narrower meaning. Manufacturing Co. v. Allen, 122 Mass. 467; Chuck v. Freen, Moody & M. 259. If Smith had had private dealings and a private account with the bank as a depositor, and his firm also had had dealings and an account there, and Smith had given security in the terms of his note in order to be allowed to overdraw or to obtain a discount, it may be that the generality of the language would be restrained to the line of dealings in the course of which it is used. *Ex parte* McKenna (City Bank Case), 3 De Gex, F. & J. 629. See Lindl. Partn. (5th ed.) 119, and note. But we are called on to construe a printed form used by the bank, and presented by it for those who borrow from it to sign. The question is, what is the reasonable interpretation of such words? When insisted on as a general formula to be used by would-be borrowers, irrespective of any special course of business of the particular person who signs it, which, for the matter of that, there does not appear to have been in this case. For all that appears, the note mentioned may have been the only transaction that ever took place between the defendant and the plaintiff alone. The printed form, it may be assumed, would have been used by the bank equally in a case where the borrower was the principal man in his firm, and the only one known to the bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the bank held was unknown. This being so, in the opinion of the majority of the court there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claim against the debtor is not inserted with a view to certain specific debts, but as a drag-net to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Corey on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firm are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner.

RAILROAD COMPANIES—ACCIDENT AT CROSSING—ABSENCE OF FLAGMAN.—The case of Richmond v. Chicago & W. M. Ry. Co., 49 N. W. Rep. 621, decided by the Supreme Court of Michigan, is interesting upon the subject of the relative duties and responsibilities of one crossing a railroad track and the flagman there stationed. It appeared that decedent was a street-car driver, and that in coming toward defendant's track he slowed his car to a walk when he was within about 25 or 30 feet of the railroad crossing, and that he could have seen the approaching train 75 feet down the track when 25 feet away from the crossing, or could have seen the train 160 feet down the track when within 16 feet of the crossing; that deceased did not stop his car, but seemed to be looking at his horse with his hand on the brake; that there was a flagman regularly stationed at the crossing, but that he was in the flag house and gave no warning of danger. It was held that it was a question for the jury to determine whether the absence of the flagman from his post of duty warranted deceased in presuming that it was safe to cross defendant's track at the time, and a finding that deceased was not guilty of contributory negligence would not be disturbed. Champlin, C. J., and Grant, J., dissenting. Morse, J., says:

It is claimed by defendant's counsel that the obstruction of the view to the south, and the absence of the watchman from his post, called upon Sherwood to have stopped, and looked and listened, before he attempted to pass this crossing. This claim would be correct if, at this street crossing, no flagman had been stationed to give warning. But the testimony shows that a flagman had been kept at this point for three or four years, whose duty it was to signal by a flag in the street the approach of trains. It is not the law of this State that, under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways, and to listen for approaching trains. It is generally required, but it is not a rule of universal application. Every case must depend upon its own circumstances, and it would be unreasonable to apply such rule, under all circumstances, without regard to the condition of things at the time. Cooper v. Railway Co., 66 Mich. 266, 33 N. W. Rep. 306. Nor is a traveler compelled, under all circumstances, to stop before a crossing, if his view is obstructed from one way. He is only required to take such precaution as an ordinarily prudent man would under like circumstances, and whether or not he did use such care is generally a question for the jury. See Guggenheim v. Railway Co., 66 Mich. 157, 158, 33 N. W. Rep. 161, and cases cited. Plaintiff's counsel contend that, it appearing that the defendant had stationed a flagman at this crossing, whose duty it was to warn parties about to cross of approaching trains, it was for the jury to say whether the deceased, in keeping his eyes directed to the flagman for the very purpose of ob-

serving a signal at the earliest moment that it could be given, was not exercising due care. They cite the following cases in support of this contention: French v. Railway Co., 116 Mass. 537; Sweeny v. Railway Co., 10 Allen, 377; Railway Co. v. Hutchinson (Ill.), 11 N. E. Rep. 856; Pennsylvania Co. v. Stegmeier (Ind.), 20 N. E. Rep. 843; Glushing v. Sharp, 96 N. Y. 676; Railroad Co. v. Schneider (Ohio), 17 N. E. Rep. 321; State v. Railroad Co. (Me.), 15 Atl. Rep. 39; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 27 Fed. Rep. 159; Tyler v. Railway Co., 137 Mass. 238; Railway Co. v. Yundt, 78 Ind. 373. In 116 Mass. the submitting of the question of contributory negligence to the jury was not affirmed upon the ground of the absence of the watchman alone, but in connection with the further fact that a train had just passed, and plaintiff did not suppose or have reason to suppose that another would follow so closely as they did, the cars doing the injury having been cut off from another train, and "shunted" down the track. In 10 Allen the flagman signaled the traveler to come on, and he went upon the track, relying upon such invitation. It was said by the court: "No express invitation need have been shown. It would only have been necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing." In Railway Co. v. Yundt, 78 Ind., the court say: "If the defendant had, for a considerable time before the accident, kept a flagman at the crossing to give signals on the approach of trains, and if the plaintiffs had been in the habit of crossing the railroad at that place, and observing the signals, and if, on the occasion of the accident, no signal was given, the plaintiffs not knowing that the services of the flagman had been dispensed with, these facts might be considered by the jury, in connection with all the other circumstances, in determining whether or not the plaintiffs were free from contributory negligence." It is also said in Railway Co. v. Hutchinson (Ill.), 11 N. E. Rep. 856. "We are aware of expressions by this court, when passing upon the law and fact, and by like expressions by other courts of the highest respectability, that the failure of one approaching a railroad crossing to pause and look for the approach of trains was such negligence as would, in the case there under consideration, preclude a recovery. But we are not prepared to say, as a matter of law, that a person approaching a railroad crossing, when there is nothing apparent to warn him of danger, and at which he knows a flagman is stationed, whose duty it is to warn all persons of danger from running trains, is required to look elsewhere than to the flagman. The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty. It may be that in this particular case a reasonably prudent and careful man would do more than observe the absence of the ordinary signal by the flagman; but, if so, the facts and circumstances should be submitted to the jury, to be considered by them in determining whether the party had, under all the circumstances, exercised ordinary care and caution to prevent injury." In Glushing v. Sharp, 96 N. Y. 676, and in Railroad Co. v. Schneider (Ohio), 17 N. E. Rep. 321, there were gates at the crossings, attended by a gateman, which gates were closed when there was danger of an approaching train, and open when there was no such danger. In both these cases, the gates being open, the persons injured drove in upon the track upon the assumption that there was no danger. It was held that such persons had the right to presume, in the absence of knowledge to the contrary, that the gatemen were properly discharging their duties; and that it was not negligent on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gatemen. The following cases tend to support the plaintiff's contention that the question of Sherwood's negligence was for the jury: Tyler v. Railway Co., 137 Mass. 238; Railway Co. v. Clough (Ill.), 25 N. E. Rep. 664; Pennsylvania Co. v. Stegmeier (Ind.), 20 N. E. Rep. 843; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 27 Fed. Rep. 159; State v. Railroad Co., 15 Atl. Rep. 36, 39; Burns v. Rolling Mill Co., 65 Wis. 312, 315, 27 N. W. Rep. 43. See also Shear. & R. Neg. § 466. On the contrary, we are cited to a case in Pennsylvania where gates and a watchman had been kept at a crossing. The gates were lowered at the approach of trains. The gates were out of repair. Being open, the plaintiff drove a hose-cart across the track without stopping or looking or listening. The watchman displayed no signal and gave no warning. The court held this to be contributory negligence on his part, and said, speaking through the chief justice: "I do not understand the law to be that, where a railroad company adopts safety gates or other appliances for the protection of the public, the public are thereby absolved from the duty of taking any care of themselves. The plaintiff was bound to do his part. He had no right to omit the ordinary precaution merely because the gates were up. Each party should be held to the exercise of due care. If the rule to stop, look and listen were observed, the accidents now so frequent could rarely occur, whether in town or country. It is as important in towns as in the country. It is sustained by competent authority, and founded on such excellent, common-sense reasons that we will neither depart from it, nor allow it to be undermined by exceptions. It is a clear and certain rule of duty, and a departure from it is more than evidence of negligence, it is negligence *per se*." Greenwood v. Railroad Co. (Pa.), 17 Atl. Rep. 188.

EVIDENCE—INJURIES—EXPERT TESTIMONY—CHILD-BEARING.—In Alabama, G. S. R. Co. v. Hill, the Supreme Court of Alabama hold that in an action by an unmarried woman for personal injuries, expert testimony that the injury would render child-bearing perilous to life is admissible as a predicate for compensation in damages. The court said:

The objection to the testimony of Dr. Drennen, to the effect that plaintiff's injuries were of such a character as that child-bearing would be thereby rendered perilous to life, is untenable. It may be that she might never have married, even had she not been injured, or that marrying, she might have had no desire to bear children, or even that, desiring issue, she might not have had any, as is argued by counsel, but these considerations can exert no influence on the question. It is to be assumed that every physical endowment, function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them; and to that extent to which any function is destroyed, or its discharge rendered painful or perilous by the wrong infliction of perilous injury, is the party complaining entitled to damages. We can, in other words, conceive of no physical injury wrongfully inflicted,

whether entailing pain only or disfigurement or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate for compensation in damages. Mayor, etc. v. Lewis (Ala.), 9 South. Rep. 243.

INFANTS — NECESSARIES. — In Kilgore v. Rich, the Supreme Judicial Court of Maine decide that a board bill contracted by an infant to enable him to attend school is a necessary, the payment for which may be recovered of him by suit. And if the infant procure another to pay the bill for him, that payment is regarded as the furnishing of necessaries, for which a suit may be maintained against the infant for the reasonable value to him, of the amount so paid. Peters, C. J., says:

The jury found that at the request of the defendant, then an infant, the plaintiff paid for him a board-bill which he had previously contracted while attending school. It was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessaries. The correctness of this ruling is perhaps unquestioned. At all events, Coke's enumeration of the kinds of necessaries has always been accepted as a true doctrine, which are these: "Necessary meat, drink, apparel; necessary physic, and such other necessaries, and likewise his good teaching or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial that an infant, being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the case satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substitute creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. In Clark v. Leslie, 5 Esp. 28, it was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessaries would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great. Swift v. Bennett, 10 Cush. 436, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiff's, who accepted the bill, and paid it when it became due. They were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his account. So in Conn v. Coburn, 7 N. H. 368, a person who signed an infant's note given for necessaries, as a surety, was allowed after payment of the note, to recover the amount paid, not upon the note, but as money for the benefit of the infant. Randall v. Sweet, 1 Denio, 460, is precisely in point in the present case.

The defendant relies on the rule generally prevaling in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessities with it. "But," says Mr. Biship, "one who pays money at his (infant's) request to a third person for necessaries can recover it." Bish. Cont. § 914. The difference is between lending or paying. Mr. Wharton (Whart. Cont. § 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific" necessaries stands in the position of the tradesman who furnishes the necessaries. In the case at bar the plaintiff could have taken an assignment of the claim, had been entitled to recover it; and there is really no good reason to defeat his claim as it is here presented.

THE TERM "WHOLLY DESTROYED" AS APPLIED AND USED IN POLICIES OF FIRE INSURANCE.

Within the past sixteen years, among other important changes in insurance law, is that made by legislation, that has occurred in a number of States,[1] in the passage of what is now commonly known as the valued policy laws, or as designated in Texas,[2] a statute valuation. Under the latter, a fire insurance policy, in case of total loss, becomes a liquidated demand against the company for the full amount of the policy. Under the former laws, the insurer is compelled, in case the property is *wholly destroyed*, to pay the whole amount of insurance, for which the policy is written, without regard to the actual value of the property. It is expressed in another way by saying, that the sum written in the policy becomes the measure of damages, in case the property is *wholly destroyed*.

Such Laws Valid and Enforcible.—These laws are held to be valid and enforcible, because based upon grounds of public policy[3] and intended to do away with great evils, mischiefs and abuses, that were subverting business morality and injuring business interests; and being founded upon such considerations, like all other private contracts, their provisions or terms cannot be waived,[4]

[1] Some of the States having valid policy laws are California, Missouri, Ohio, New Hampshire, Wisconsin and Texas.

[2] Sun Mut. Ins. Co. v. Holland, 2 Tex. Civ. Cas. 448; Substance of R. S., 2971.

[3] Rieley v. Franklin Ins. Co. etc., 43 Wis. 449; Williams v. Hartford Fire Ins. Co., 54 Cal. 442.

[4] Chitty on Con., 598; Staines v. Wainright, 6 Bing. (N. C.) 174: White v. Conn. Mut. L. Ins. Co., 55 N.

either by express stipulation or doubtful implication. These laws only relate to real property [5] or to an insured building.[6]

They were a direct innovation upon this class of contracts and quite reversed, not only their expressed terms as they were in use, but changed the universal practice and understanding of all parties connected with them. As a result, both litigants and courts have differed widely in their opinion in the construction to be placed upon or given this stranger. As an usurper it entirely ignored the normal principle of safety and justice that is found to regulate all contracts when left to their natural business currents and for their success, depend upon their own merits.

Ordinarily, the term does not suggest itself as difficult of application; but being punitory and corrective in character, coupled with the various circumstances of each case and the provisions of each contract, whether the term was intended by the law makers to mean legally total extinction, loss of identity or character, total loss, or striking a bookkeeper's balance, between the value of the ruins and the cost of removing the debris, there is yet a lack of unity in the courts.

Form and Specific Character.—In about the first case [7] in which it was judicially decided what the distinction was between a partial and total loss under this valued policy law, it was held that *wholly destroyed* did not mean an absolute extinction by fire of the property.

The court says: "The question is * * * whether, after the fire, the thing insured still exists as a building. * * * The fact that after the fire a large portion of the four (brick) walls were left standing and some of the iron work still attached thereto, * * * still, if the building has lost its identity and specific character as a building, it was *totally destroyed.*"

It is pertinent here that the basis of the decision is, that the insurance is upon a building as such, and not upon the material of which it is composed, nor upon valuations, and this is borne out in principle by other courts and authorities.[8] It would seem that in the early decisions at least, under these laws an analogy for this rule was claimed in marine insurance law.[9] There the rule of absolute extinction of the thing insured obtains and it is said to be strictly followed. If this is true in using the analogy, as a precedent here, the same regard has been paid to a literal interpretation of the language, at the sacrifice of the subject-matter the antecedent and subsequent relation of the parties to these contracts, and the difficulty sought to be removed, all of which enter into the construction to be given.[10] At the same time, it is to be observed in this same connection that it is the policy of these laws to protect property and to offer to society a larger measure of security, while rendering full justice to the insured. But they also contemplate and do effectually abridge the natural rights of the parties concerned,[11] and with such effects these laws should be strictly construed, with a broad scope, sufficient to include all of the influences that bear upon the measure of construction.

Total Loss not an Equivalent.—The term total loss is a native of marine insurance and the precedents for the construction of the valued policy laws, were at least, given color by this doctrine of total loss as founded in that branch of the law. Here it must be observed, as a very important factor, that a total loss may be either actual or constructive.[12]

When the loss is not absolutely total in the ordinary sense of the term, but occurred in such a manner that the insurer is deemed to be justified in abandoning all efforts to save what remains under the marine insurance law upon a formal notice of an abandonment of his interests to the underwriter, he is en-

H. 249, 5 Cent. L. J. 486, 52 Me. 322; Phalen v. Clark, 19 Conn. 421; Nellis v. Clark, 4 Hill, 424; Dodson v. Harris, 10 Ala. 566; Mortin v. Wade, 37 Cal. 158; Hoover v. Pierce, 27 Miss. 13; Thompson v. The Cit. Ins. Co., 45 Wis. 388.

[5] Sec. 1943, R. S. Wis.

[6] Sec. 6009, R. S. Mo.

[7] Williams v. Hartford Fire Ins. Co., 54 Cal. 442

[8] May on Ins. (last edition), sec. 421*a*; Nave v. Howe Mut. Ins. Co., 37 Mo. 430; Huck v. Globe Ins. Co., Mass. ; Hugg v. The Augusta Ins. Co., 7 Howard, 595; Morcardier v. Chesapeake Ins. Co., 8 Cranch, 47; Judah v. Randall, 2 Caines Case, 324.

[9] Ins. Co. v. Fogerty, 19 Wall. 644.

[10] Inhabitants of Gray v. Conney Commissioners, 22 Atl. Rep. 376.

[11] Endlick on the Interpretation of Statute. Sec. 329.

[12] Civ. Code Cal. 2702: Cir. Code N. Y. 1476; Idle v. Royal Ex. Ins. Co., 7 Taunt. 755; Cambridge v. Atherton, 1 Russ. & M. 60, 2 Barn. & C. 91; Roux v. Salvador, 2 Bing. N. C. 288; Dyson v. Rowcroft, 3 Bos. & P. 474; Gordon v. Mass. F. & M. Ins. Co., 2 Pick, 249, 2 Parsons Mar. Ins. 86, 2 Phillips Ins. sec. 1497.

titled to claim a (constructive) total loss.[13] Not because the thing insured is a total, absolute loss to him, but putting it plainly, because as a matter of dollars and cents, he would prefer at the moment to turn over to the insurer what remains and take the amount of his insurance.

The same doctrine or an equivalent on a test of a (constructive) total loss on a cargo, it is said has not been incorporated into the American law of marine insurance.[14] There are equivalents in this branch of the law for the doctrine of abandonment. Prominent among them is, when the circumstances justify a sale of the vessel by a master at a distant port without formal notice of abandonment, because it is said by operation of the election to sell, and treat the proceeds of the sale as salvage for the benefit of the underwriter, it is considered a substitute for the doctrine of abandonment and the title is deemed thereby to have passed from the owner to the insurer; or, a capture on the high seas, which precludes the probabilty of any subsequent restoration, which makes an abandonment necessary. However, in all of these equivalents the underwriter is subrogated entirely to the rights of the insurer and is entitled to all salvage that may be subsequently secured, which thus accomplishes the same object that a notice of abandonment furnishes. When there is any formal abandonment (and the notice must be timely to be effectual), or none of these equivalents exist, and recovery for a total loss can only be had when it is shown that *no value* remains in the hands of the owner. In other words, if there is no formal abandonment and the circumstances held to constitute an equivalent do not exist, the loss must be entire.

A close examination here in this branch of the law will reveal the fact that the authorities are not all agreed upon what constitutes this total or complete loss; but one of the common tests, is the rule sanctioned and applied to one of these policy contracts of fire insurance in the California case,[15] to-wit: "Whether the thing remains in specie or not." But then to this doctrine of abandonment peculiar to marine insurance with its realm of salvage, subrogation, equivalent and inherent nature of the thing insured, the character of the insurance, the question of whether the loss is to be regarded as total (bearing in mind that it may be either, constructive or actual, or only partial) often arises. The same question under the fire insurance law would be, whether the destruction was to be regarded as entire or partial; and hence, if the analogy is used in deciding the question all of the factors belonging to it must obtain. Then the importance of the question of values would become primary, but as the foundation for the rule in marine insurance to-wit: the doctrine of abandonment or its equivalents is not found in fire insurance law. The significance of the term, total loss, as it is used, for lack of this doctrine, would not necessarily be the same. Therefore, total loss as used in marine insurance is not synonymous to *wholly destroyed* in fire insurance law.[16]

It has been made an equivalent to total loss in marine insurance by holding the term to mean a total destruction of the identity or character of the building, as such, rather than a total extinction of all the material composing the building.[17]

The Question of Values. — Another rule before referred to, to determine whether a building is *wholly destroyed* or partially, is the one followed by another line of authorities, to-wit: When the ruins contain greater value than the cost of removing it, then the property insured is not *wholly destroyed* within the legal use of the term.[18] The sound reason for this rule seems to be that the whole question of insurance is one of indemnities or values. The early text writers state that an insurance contract is one in which, for a consideration a party undertakes to compensate another, *if he shall suffer* loss; and that its requisites are the payment of a consideration by the one the promise of the other to pay the amount of loss agreed upon, or to be determined upon investigation upon the happening of the contingency contemplated.[19]

[13] Civ. Code Cal. 2705; Civ. Code N. Y. 134; Kent's Com. 321; Peele v. Merchants' Ins. Co. 3 Mason, 27, 41; Brodlie v. Maryland Ins. Co., 12 Pet. 397; Coeplin v. Phœnix Ins. Co., 46 Mo. 211; Wool W. C. C. R., 283, 9 Wall, 461; Ruckman v. Merchants L. I. Co., 5 Due, 342; The Brig Sarah Ann. 2 Sum., 206; Fulton Ins. Co. v. Goodman, 32 Ala. 108.

[14] 2 Parson's Mar. Law, 385.

[15] Williams v. Hartford, *supra*.

[16] Barber Principles of Ins., sec. 163.

[17] Oshkosh P. & P. Co. v. Mercantile Ins. Co., 31 Fed. Rep. 200.

[18] Ampleman v. Citizens' Ins. Co., 35 Mo. App. 308; Harriman v. Queen Ins. Co., 49 Wis. 71; Seyk v. Miller's Nat. Ins. Co. (Wis.), 41 N. W. Rep. 443; 1 Woodman Ins., sec. 107.

[19] Commonwealth v. Wetherby, 105 Mass. 149.

The early history of insurance also shows it to have had its origin in the necessities of commerce, and that under the guidance of the sprit of modern enterprise, tempered by a prudent forecast, it has from time to time adapted itself to the new interests of advancing civilization and that wherever danger is probable or protection required, it promises indemnity.[20] We further find that this principle underlies the contract and that it can never, without violence to its essence and spirit be made by the assured a source of profit itself, solely perhaps to indemnify against loss or damage.[21]

The French writers term a policy of insurance an Aleatory Contract.[22] As a contract of indemnity for loss or damage it is a personal contract and does not run with the title of the property, no matter what the subject of the insurance is. Satisfaction is to be made to the person insured for the loss he may have sustained, for as another author says, it cannot be properly said to be insuring the thing since there is no possibility of doing it and therefore must mean insuring the person from damage. It being then, *ab initio*, a personal contract of indemnity, impossible of application to the thing insured, it has to deal only with values. So, that if in the modern building the craze for high structures continues, fire which destroys the *integrity* of a building worth $20,000, and leaves an iron frame work and foundation worth $10,000, the building is not *wholly destroyed*.

The foregoing are among the primary reasons for the application of this test. Perhaps it is best stated in the case of Ampleman v. Citizens Ins. Co., *supra*, in which the court says: "Keeping the nature of the contract in view, it is not obvious how the building can be considered to be *wholly destroyed* as long as any parts thereof, which are subject to the action of fire remains standing and can without removal be effectually utilized in its re-construction so that said property shall be in as good condition when re-built as it was before the fire. The law does not mean that a building is *wholly destroyed when its integrity as a structure is gone*. Such integrity is called in question in case of a partial destruction contemplated in the statute. The insurance is only against fire and its incidents."

A recent case of writers illustrates the same rule (the case has not as yet reached the courts of last resort). The property insured was a pulp mill and machinery with water power. It was burned with ten feet of water in the flumes. Before the fire it was valued at $40,000.00 and the proofs were that the bulk heads, foundation, flumes and water wheels, that were not injured were worth $10,000.00. From the stand-point of indemnity to the insured against loss and damage this property was not *wholly destroyed*, although nothing remained of the building proper after the fire.

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[20] Insurance contracts are fundamentally for indemnity and will be liberally construed to that end. Ins. Co. v. Hughes, 10 Lea (Tenn.), 461.

[21] Wilson v. Hill, 3 Met. 66; Kulen Kempt v. Vigne, 1 T. R. 304, per Buller, J.; Franklin Fire Ins. Co. v. Hamill, 6 Gill, 87.

[22] From Alea, a die, dice, or throw of the dice for which our adjective gaming and hazardous are not exact equivalents (May on Insurance, sec. 5).

NEGLIGENCE—DANGEROUS PREMISES—RAILROAD TURN-TABLE—"ATTRACTION" TO CHILD.

DANIELS V. NEW YORK & N. E. R. CO.

Supreme Judicial Court of Massachusetts, Sept. 3, 1891.

A railroad company owning a turn-table situated on the company's land, about 600 feet from two highways, and having upright guy-bars, is not bound to keep it locked on the ground that it is an attractive object to children, and a child injured while playing thereon cannot recover.

LATHROP, J.: The plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is that, if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted, or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table. The turn-table is stated in the

exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about 1,000 feet from the turn-table; that they then asked some trainmen who were switching cars on the tracks adjacent to the turn-table to let them ride on the cars, and, on being refused, went to the turn-table. The only thing stated in the exceptions to show that the turn-table was attractive is that it had large upright standards or guys, 12 to 15 feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that, if a turn-table is of a dangerous nature and character, when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. Stout v. Railroad Co., 2 Dill. 294; Railroad Co. v. Stout, 17 Wall. 657. The decision of the Supreme Court of the United States was apparently approved of in Railroad Co. v Bailey, 11 Neb. 332, 9 N. W. Rep. 50, and followed in Railway Co. v. Simpson, 60 Tex. 103; Railway Co. v. Styron, 66 Tex. 421, 1 S. W. Rep. 161; Evansich v. Railway Co., 57 Tex. 123; Railway Co. v. McWhirter, 77 Tex. 356, 14 S. W. Rep. 26. See, also, Bridger v. Railroad Co., 25 S. C. 24; Ferguson v. Railway Co., 75 Ga. 637, 77 Ga. 102. The second class of cases proceeds upon the doctrine of constructive invitation; that is, that, if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser; and it is held that leaving a turn-table unguarded is such an act. Keffe v. Railway Co., 21 Minn. 207; O'Mally v. Railway Co., 21 Minn. 207; O'Malley v. Railway Co., 43 Minn. 289, 45 N. W. Rep. 440; Railway Co. v. Fitzsimmons, 22 Kan. 686; Nagel v. Railway Co., 75 Mo. 653. The decision of the Supreme Court of the United States in Railroad Co. v. Stout, rests upon the proposition stated by Mr. Justice Hunt, "that, while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." The cases cited in support of this proposition are Lynch v. Nurdin, 1 Q. B. 29; Birge v. Gardner, 19 Conn. 507; Daley v. Railroad Co., 26 Conn. 591, and Bird v. Holbrook, 4 Bing. 628. With the exception of Daley v. Railroad Co., all of these cases come within other rules, or within well-defined exceptions to the general rule that a land-owner owes no duty to a trespasser, except he must not wantonly or intentionally injure him or expose him to injury. Lynch v. Nurdin, *ubi supra*, rests upon the doctrine that, if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary, however, was held in Hughes v. Macfie, 2 Hurl. & C. 744, and in Mangan v. Atterton, L. R. 1 Exch. 239. In Lane v. Atlantic Works, 111 Mass. 136, the plaintiff was found to be without fault, and not a trespasser. See, also, Clark v. Chambers, 3 Q. B. Div. 357; Powell v. Deveney, 3 Cush. 300. Birge v. Gardner, *ubi supra*, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is Hydraulic Works Co. v. Orr, 83 Pa. St. 332. Bird v. Holbrook, *ubi supra*, decides that a land-owner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that, if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same, though no notice is given. Johnson v. Patterson, 14 Conn. 1. This, as pointed out by Morton, J., in Marble v. Ross, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. Marble v. Ross, *ubi supra*. The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. Larue v. Hotel Co., 116 Mass. 67; Beck v. Carter, 68 N. Y. 283. The case of Daley v. Railroad Co., *ubi supra*, so far as it tends to support the result reached in Railroad Co. v. Stout, *ubi supra*, must be considered as overruled by Nolan v. Railroad Co., 53 Conn. 461, 4 Atl. Rep. 106.

The court of appeals of New York has stated, in a well-considered case, that it does not uphold the decision in Railroad Co. v. Stout, *ubi supra*, and, although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. McAlpin v. Powell, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire-escape, and fell through a trap-door therein, which was insecurely fastened. The defendant was the landlord of the house, and it was his duty to keep the fire-escape in order. It was held that he owed no duty to one who was using the fire-escape for his own pleasure, and that the defendant was not liable. In Frost v. Railroad Co., 64 N. H. 220, 9 Atl. Rep. 790, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was that he was attracted to the turn-table by the noise of boys playing upon it. The turn-table was on the defendant's land about 60 feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and

that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of Railroad Co. v. Stout, *ubi supra*. On the question whether the defendant was liable on the ground of an implied invitation, Clark, J., in delivering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or inclose it, or exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys, who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted. Hounsell v. Smyth, 7 C. B. (N. S.) 731, and cases cited; Clark v. Manchester, 62 N. H. 577; Klix v. Nieman, 68 Wis. 271, 32 N. W. Rep. 223; Gramlich v. Wurst, 86 Pa. St. 74; Cauley v. Railway Co., 95 Pa. St. 398; Gillespie v. McGowan, 100 Pa. St. 144; Hargreaves v. Deacon, 25 Mich. 1. See, also, Sweeny v. Railroad Co., 10 Allen, 368; Metcalfe v. Steam-ship Co., 147 Mass. 66, 16 N. E. Rep. 701, and cases cited; Barstow v. Railroad Co., 143 Mass. 535, 10 N. E. Rep. 255. In Johnson v. Railroad Co., 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars, and went to a house near by, intending to take a later train for Lawrence. After remaining at the house for a while, she returned to the station, and, while crossing the tracks to the station of another railroad corporation to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth so as to form a convenient passage-way; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it, and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passage-way by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See, also, Wright v. Railroad Co., 129 Mass. 440. In Morrissey v. Railroad Co., 126 Mass. 377, a child, four years of age, was run over by the cars of a railroad corporation while using the track as a play ground. There was a foot-path across the track which was used by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the path. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and willful carelessness; and this question was submitted to the jury, who found for the defendant. In Wright v. Railroad Co., 142 Mass. 296, 7 N. E. Rep. 866, there was a well-defined path leading to a railroad track, and an opening in a ridge near the track, and a passage-way for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight-cars stood on the track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age, was injured while going to school, and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track. The case of McEachern v. Railroad Co., 150 Mass. 515, 23 N. E. Rep. 231, came up on demurrer to the declaration, which alleged, in substance, that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable, upon receiving a slight touch, to fall to the ground; that the defendant well knew that said car "then was, and would be, an enticing, attractive, and inviting object to children, and well knowing that children then were, and long prior thereto had been, accustomed to play in, upon, around and about such cars as might happen from time to time to be placed upon any of said side tracks;" that the plaintiff, being then upwards of 11 years of age, was traveling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an lawful act in meddling with the defendant's car; that he was not invited

or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit. In McCarty v. Railroad Co., 153 Mass. —, 27 N.E. Rep. 773, a child about five years old strayed from the yard of the house in which it lived onto a street, and thence into the freight-yard of a railroad corporation, where it was injured. The freight-yard was parallel with the street and there was no fence between. It was held, in the absence of evidence that a fence was required by Pub. St. ch. 112, § 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff. The cases which we have last cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him. The superior court rightly directed a verdict for the defendant. Exceptions overruled.

NOTE.—The principal case, in so far as it holds that a railroad company is not under any circumstances liable for injury to trespassing children, is clearly opposed to the weight of authority. The general rule undoubtedly is, that one is not liable for an injury received by a child who is at the time a trespasser. Oil City, etc. Bridge Co. v. Jackson, 114 Pa. St. 321; Schmidt v. Kansas City Distilling Co., 90 Mo. 284, 59 Am. Rep. 16; Atchison, etc. R. R. Co. v. Flinn, 24 Kan. 627; Emerson v. Peteler, 35 Minn. 481, 59 Am. Rep. 337; Wiles v. R. R. Co., 4 Hughes, 172; Wendell v. R. R. Co., 91 N. Y. 420; Klix v. Nieman, 68 Wis. 271, 60 Am. Rep. 854; Fay v. Kent, 55 Vt. 557; Galligan v. Metacomet Manufacturing Company, 143 Mass. 527; Chicago, etc. R. R. Co. v. McLaughlin, 47 Ill. 265; Central Branch R. R. Co. v. Nenigh, 23 Kan. 347, 33 Am. Dec. 167; *Ex parte* Stell, 4 Hughes, 157.

The law, however, requires special efforts on the part of the defendant to prevent an injury after it is discovered. Schwier v. R. R. Co., 90 N. Y. 558; Little Rock R. R. Co. v. Barker, 39 Ark. 491; Burnett v. R. R. Co., 16 Neb. 332. But a person is liable for an injury to a child trespassing upon his premises where he would not be in the case of an adult. See 3 Lawson's Rights, Remedies and Practice, § 1209, p. 2126. "In the case of young children," says Judge Cooley (Cooley on Torts, 303), "and other persons not fully *sui juris*, an implied license might sometimes arise when it would not in behalf of others. Thus, leaving a tempting thing for children to play with exposed where they would be likely to gather for that purpose, may be equivalents to an invitation to them to make use of it. And perhaps, if one were to throw away upon his premises, near the common way, things tempting to children, the same implication should arise." Here, where it appears that from the position of the dangerous object or defect, it would be likely to attract and cause injury to children, the owner will be held liable. Lynch v. Nurdin, L. R. 1 Q. B. 29; Hydraulic Works v. Orr, 83 Pa. St. 332. This principle applies in the case of machinery left so near the highway as to attract passing children who, not interfered with, proceed to meddle with it, and injure themselves. See Porter v. Railroad Co., 36 Mo. 484, and cases cited in the principal case. In like manner, owners of cars left standing on a public street crossing are liable for injury caused thereby to a child of tender years who attempts to pass under them. Lynch v. Nurdin, *supra*. So, persons who carry on a dangerous work like excavating sand in a neighborhood where there are many small children, are bound to take measures to keep them away from it. Fink v. Furnace Co., 10 Mo. App. 61. As the principal case shows, it has been held in numerous cases in this country that a child of tender years sustaining an injury while playing on a railroad turn-table left unlocked and unguarded, may maintain an action therefor, even though he is a trespasser at the time, it being on the company's premises.

In addition to the cases cited in the principal case as sustaining that proposition, we call attention to Keefe v. Milwaukee R. R. Co., 21 Minn. 297; Kansas Central R. Co. v. Fitzsimmons, 22 Kan. 686, and Koons v. R. R. Co., 65 Mo. 592. But in all these cases the turn-table was either on the public way or near it, or in a part of the company's premises open to strangers, or so near thereto as to attract the attention of passing children. Following this principle, therefore, in another case it was held that the railroad company was not liable where the turn-table was unlocked and unguarded, and was constructed in an isolated place not near any public street or place where the public were in the habit of passing. St. Louis, etc. R. Co. v. Bell, 81 Ill. 76, 25 Am. Rep. 269. The leading case of Sioux City v. Stout, 17 Wall. 657, decided by the United States Supreme Court, simply decided that under certain circumstances a railroad company may be liable on the ground of negligence for a personal injury to a child of tender years in a town or city, caused by a turn-table built by the company upon its own unenclosed land, and which is left unguarded and unlocked in a situation which is likely to cause injury to children, thus in effect leaving to the jury to say under the circumstances of each case, whether the act of the defendant is negligence. And to us this seems to be the true rule, and one upon which the authorities may be in some measure harmonized. The principal case, however, cannot be brought within the operation of this test, inasmuch as the court plainly hold, as a matter of law, that under the circumstances of the case, the act of the defendant was not negligent.

The true rule upon this subject might perhaps be stated thus: While the owner of land is not bound to provide against remote and improbable injuries to children trespassing thereon, there is a class of cases which holds owners liable for injuries to children, although trespassing at the time, when, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happened. In such case the question of negligence is for the jury.

BOOKS RECEIVED.

LAWYERS' REPORTS, ANNOTATED. Book XI. All Current Cases of General Value and Importance decided in the United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Burdett A. Rich, Reporter. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1891.

AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated. By A. C.

Freeman and the Associate Editors of the "American Decisions." Vol. 20. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1891.

A DIGEST OF THE DECISIONS OF THE COURTS OF LAST RESORT of the Several States, from the Earliest Period to the Year 1888, Contained in the One Hundred and Sixty Volumes of the American Decisions and the American Reports, and of the Notes therein Contained. By Stewart Rapalje. Vols. I, II, and III. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1891.

LECTURES ON THE CONSTITUTION OF THE UNITED STATES, by Samuel Freeman Miller, LL.D., Late an Associate Justice of the Supreme Court of the United States. New York and Albany: Banks & Brothers, Law Publishers. 1891.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE.—Where one, who is running rapidly towards an approaching train for the purpose of getting the mail-bags, stumbles as he nears the track, and falls against the engine, the injury is clearly not "intentional" within the exception of an insurance policy; nor can it be construed as the result of "walking or being on a railroad" track, or of "voluntary exposure to unnecessary danger," within the meaning of other exceptions.—*Equitable Acc. Ins. Co. v. Osborn*, Ala., 9 South. Rep. 869.

2. ADMINISTRATION.—The duty of administering the estate of an intestate is devolved by law upon the administrator, not on the heirs and distributees, who have a right to act for the protection of their own interests, and in doing so to invoke and accept the co-operation of the administrator in resisting creditors by all lawful means; and if creditors are thus defeated, and the estate is saved to the heirs and distributees, though in the mean time wasted by the administrator, and he becomes insolvent, the sureties on his administration bond are not discharged.—*McMahon v. Paris*, Ga., 13 S. E. Rep. 572.

3. ADMINISTRATION — Guardian — Sale of Land.—The rule which disables a trustee from purchasing for his own benefit at a sale made by him in the discharge of a fiduciary duty is not applicable to the guardian of minor heirs, when a sale of real property belonging to the estate of one deceased is sold by an administrator under the order of the probate court for the purpose of satisfying a claim against the estate which has been duly presented and allowed.—*Barber v. Bowen*, Minn., 49 N. W. Rep. 684.

4. APPEAL—Reformation of Deed.—Where, in an action to reform a deed, so that a certain line reading "west about ten rods" would read "west two rods," the evidence is conflicting as to the amount of land intended to be conveyed, the findings of the trial court will not be disturbed.—*Loud v. Barnes*, Mass., 28 N. E. Rep. 271.

5. ATTACHMENT—Dissolution.—While, on a motion to dissolve an attachment, the merits of a cause of action cannot be questioned, yet this rule will not prevent the defendant, on such motion, from stating any pertinent fact to explain the transaction out of which the suit arose, even if in doing so he make it appear that the sum claimed is too large.—*Hamilton v. Johnson*, Neb., 49 N. W. Rep. 703.

6. ATTACHMENT — Service of Process.—Under Comp. Laws N. M. §§ 1898, 1935, providing that process in attachment shall be served upon a resident defendant, if he be absent, by delivering a copy of the original process to some person over 15 years of age residing at his usual place of abode, service by publication is not necessary.—*Bell v. Gaylord*, N. M., 27 Pac. Rep. 494.

7. ATTACHMENT OF DEBTS AND CREDITS.—Code Civil Proc. Cal. §§ 542-545, concerning attachments, provides that debts owing to the defendant, or any other personal property belonging to the defendant, under control of a third person, may be attached. Section 546 provides that the sheriff must make a full inventory of the property attached, and he must request, at the time of serving the writ, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each: *Held*, that an attachment of "certain credits belonging to the defendant" does not give the attaching creditor a lien on or right to a debt owing to the defendant by the party served with the writ.—*Gow v. Marshall*, Cal., 27 Pac. Rep. 422.

8. BUILDING AND LOAN ASSOCIATIONS. — Where a building and loan association sells out, and assigns in writing all its claims for unpaid loans, thereby realizing a fund sufficient to raise the value of its stock to the maximum fixed by the constitution or the by-laws, and with this fund, in connection with other assets, pays off and satisfies all its stockholders, and entirely ceases to transact business, it is virtually dissolved, and is incapable of further prosecuting a pending action founded upon a bond so transferred and assigned after the action was brought.—*Van Pelt v. Home Building & Loan Ass'n*, Ga., 13 S. E. Rep. 574.

9. CARRIERS—Live stock.—Under a contract for the transportation and delivery of live-stock, providing that live animals will only be taken at the owner's risk of injury "during the course of transportation, loading and unloading," unless otherwise specially agreed, the carrier is bound to unload the animals, although at owner's risk.—*Benson v. Gray*, Mass., 28 N. E. Rep, 275.

10. CONSTITUTIONAL LAW — Carrying Concealed Weapons—City Ordinance.—Const. Cal. art. 11, § 11, providing that any city may make all such local police regulations as are not in conflict with general laws, empowers a city to prohibit by ordinance the carrying of concealed weapons by persons, not public officers or travelers, without a permit from the police commissioners.—*In re Cheney*, Cal., 27 Pac. Rep. 436.

11. CONSTITUTIONAL LAW—Ex post Facto Laws.—Const. Wash. art. 1, § 25, provides that offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law. Section 26 provides that "no grand jury shall be drawn or summoned in any county except the superior judge thereof shall so order:" *Held*, that these provisions are not *ex post facto* as to offenses committed prior to their adoption, since indictment by a grand jury is not a substantial right, but merely a method of procedure, and that such offenses may be prosecuted upon information.—*Lybarger v. State*, Wash., 27 Pac. Rep. 449.

12. CONTRACT—Measure of Damages.—Where, in an action for breach of contract, the complaint alleges that d efendant agreed to deliver to plaintiff, at A, 12,

000 dozen eggs, as soon as they could be transported from O, and that the eggs arrived at A on July 8th, but were not delivered to plaintiff until July 14, evidence of the price of eggs on July 18th is inadmissible to show damage.—*Ramish v. Kirschbraun*, Cal., 27 Pac. Rep. 433.

13. CONTRACTS—Parol Evidence to Vary.—One who in writing assigns a written contract to another, knowing that a third person was to be equally interested with the assignee in the rights assigned, cannot show by parol that such third person was intended to be bound by an agreement which he did not sign, executed by the assignee in consideration of the assignment.—*Ferguson v. McBean*, Cal., 27 Pac. Rep. 518.

14. CONTRACT—Quantum Meruit.—An architect contracted to draw plans and specifications for a building, let the contract, and superintend the construction, and was to receive for his service three and one-half per cent. of the cost of the building. After the plans and specifications were completed the employer refused to accept them: *Held*, in an action upon *quantum meruit*, that the measure of recovery was such a proportion of the three and one half per centum as the work done bore to the whole work contracted for.—*Noyes v. Pugin*, Wash., 27 Pac. Rep. 548.

15. CONTRACT UNDER SEAL.—A contract under seal, concerning the disposition of an estate, provided, viz: "I, the said C S, do hereby covenant and agree to and with the said G S, and to and with such person as may be the wife of said G S at the time of his decease, that if the said G S shall die in my life-time, and leave a widow living, I will from and after the decease of said G S and during my life-time pay over to such person as may be the widow of said G S one-third of the entire income aforesaid to which I may be entitled as such survivor:" *Held*, that the widow of G S could not maintain an action on the contract.—*Saunders v. Saunders*, Mass., 28 N. E. Rep. 270.

16. COUNTIES—Issue of Bonds—Constitutional Limitation.—Const. Wash. art. 8, § 6, providing that "no county shall for any purpose become indebted in any manner to an amount exceeding one and one half per centum of the taxable property in such county, without the assent of three-fifths of the voters therein," does not authorize the county commissioners to incur an indebtedness to the one and one-half per cent. in addition to any indebtedness which may have been incurred before such provision took effect.—*Rehmke v. Goodwin*, Wash., 27 Pac. Rep. 473.

17. COUNTY ATTORNEY—Powers of Court.—A county attorney is a *quasi* officer of the district court, and hence said court is exercising a proper function when it fixes and determines the salary to be paid such officer, upon appeal from the action of county commissioners, as authorized by Gen. St. 1878, ch. 7, § 3, as amended by Gen. Laws 1885 ch. 17, § 1.—*Rockwell v. Board of County Commissioners*, Minn., 49 N. W. Rep. 690.

18. COUNTY BOARDS OF HEALTH.—The act of 1885, ch. 3603, providing for the creation of county boards of of health, and constituting them corporations, must be construed in connection with the acts of 1879, ch. 3162, 1881, ch. 3312, and 1883, ch. 3443, Laws Fla., as being *in pari materia*, and having in view one object.—*Forbes v. Board of Health*, Fla., 9 South. Rep. 862.

19. CRIMINAL LAW—Aider and Abettor.—Where an indictment for murder charges one defendant as principal and another as aider and abettor, the latter may be convicted as principal, where the evidence discloses that he was the actual perpetrator of the deed.—*Benge v. Commonwealth*, Ky., 17 S. W. Rep. 146.

20. CRIMINAL LAW—Burglary — Possession of Stolen Property.— Recent possession, not satisfactorily explained, of goods stolen from the house at the time the alleged burglary was committed, may be sufficient as a basis of conviction of burglary, where the burglary has been established, and the jury believe from all the evidence beyond a reasonable doubt that the accused is the guilty party.—*Mangum v. State*, Ga., 13 S. E. Rep. 558.

21. CRIMINAL LAW—Forgery—Signing Fictitious Name.—One who, with intent to forge the check of R & M, signs the name "A E R & Co." thereto, believing it to be the true name of the firm, is not guilty of forgery, but may be prosecuted under Pen. Code Cal. § 476, declaring it a crime to make and pass checks bearing fictitious names, with intent to defraud.—*People v. Elliot*, Cal., 27 Pac. Rep. 433.

22. CRIMINAL LAW—Forgery of License as Teacher.—No provision of the Penal Code of this State makes it an offense to utter and publish as true a false and fraudulent certificate or license issued by the county school commissioner to a teacher.—*Maddox v. State*, Ga., 13 S. E. Rep. 559.

23. CRIMINAL LAW—Homicide.—One of the questions in grading the homicide being as to whether the pistol was recklessly fired, with criminal indifference to the consequences, it was not necessary, in order to constitute the offense of murder, that the accused should have been engaged in an unlawful act at the time of firing it. A request to charge the jury, the whole of which is not pertinent and legal, should be declined.—*Pool v. State*, Ga., 13 S. E. Rep. 556.

24. CRIMINAL LAW—Insanity.—Where a defense of insanity was interposed on a trial for assault with intent to kill, and the court charged that defendant was not responsible unless he was conscious of his act at the time it was committed, it was not error to refuse to charge that, although defendant may have felt an impulse to do the act while conscious, if such consciousness did not exist up to and at the time the act was committed, the jury should acquit.—*People v. Clendennin*, Cal., 27 Pac. Rep. 418.

25. CRIMINAL PRACTICE — Complaint — Warrant of Arrest. — Pen. Code Cal. §§ 811, 813, provide that when an information is laid before a magistrate he must take the depositions of the informant and his witness, if any; that the depositions must set forth the facts tending to prove the offense, and the guilt of defendant; that, if the magistrate is satisfied therefrom that an offense has been committed, and there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest: *Held*, that when the information is positive in its allegations of every fact necessary to support the charges laid, it is a sufficient deposition within the meaning of the statute, and a warrant may be issued thereon.—*People v. Staples*, Cal., 27 Pac. Rep. 523.

26. CRIMINAL PRACTICE — Larceny.— An information charging defendant "with the crime of felony," in "stealing, taking, and driving away" a horse, the property of the person named, is not defective in failing to charge that the offense was feloniously committed, where no such objection was urged in the court below.—*People v. Lopez*, Cal., 27 Pac. Rep. 427.

27. CRIMINAL TRIAL—Presence of Prisoner.—On a trial for murder it is the right of the accused to be present at all stages of the proceeding, and it is the duty of the court to see that he is present when any charge is delivered to the jury. If the judge recharges the jury without verifying for himself the prisoner's presence, and it afterwards appears that the prisoner was not present, but was in an adjoining room, in the custody of an officer, and did not know that the jury was being recharged, and knowledge did not come to him until after such recharge was concluded, it is cause for a new trial.—*Wilson v. State*, Ga., 13 S. E. Rep. 566.

28. DEED—Cancellation.—A complaint for the reconveyance of real estate, which alleges that defendant, while acting as plaintiff's agent, proposed that she convey all her real estate to him for the purpose of managing the same, promising to reconvey on demand, that she was induced by his representations and promises to make the conveyances, and that at the time of making the promises he had no intention of performing them, but made them with the fraudulent purpose of inducing her to put the property in his hands that he might cheat and defraud her, sufficiently sets out the facts which constitute the alleged fraud.—*Alanis v. Casenave*, Cal., 27 Pac. Rep. 521.

29. DEED—Construction.—Where a will has been admitted to probate in solemn form by the court of ordinary, and an appeal has been entered to the superior court, during the pendency of which legatees to whom real estate was devised by the will made a compromise of the litigation over it with the administrator *cum testamento annexo*, and, in pursuance thereof, conveyed to him individually "all right, title, interest, and claim, vested or contingent, which [they] have or may have in the future unto and to [said real estate] under and by virtue of [said will], directly or indirectly," *held*, that this deed conveyed to the grantee therein all rents which up to this date had accrued upon the real estate mentioned, and which had never been paid over to said legatees, the title to the rents being dependent upon the interest devised in the realty.—*Chisholm v. Spullock*, Ga., 13 S. E. Rep. 571.

30. DEED — Construction — Boundaries. — Plaintiff's grantor owned land on the north side of a river. Defendants had dug a channel through a part of grantor's land, leaving a narrow strip between the old river-bed and such channel. The river changed its course, and ran through such artificial channel. The deed to plaintiff was of land bounded on the river. His grantor owned no land on the south side of the old river-bed. *Held*, that the deed conveyed the land to the old bed of the river, and included the strip in question.—*McDonald v. Morrill*, Mass., 28 N. E. Rep. 259.

31. DEED—Record.—A deed purporting to be executed in one county cannot be legally recorded upon the attestation of a notary public of another county, together with that of an unofficial witness. A certified copy taken from a record so made, is no evidence of the execution of an original deed corresponding with it, and is not admissible in evidence in lieu of such original without further proof.—*Allgood v. State*, Ga., 13 S. E. Rep. 569.

32. DIVORCE—Obstinate Desertion.—Desertion cannot be considered as obstinate on the part of one when the separation is acquiesced in and entirely satisfactory to the other, who neither entertains nor manifests any desire that the separation or the causes which brought it about should cease.—*Chipchase v. Chipchase*, N. J., 22 Atl. Rep. 588.

33. EASEMENTS—Creation—Right of Way.—A conveyance of land, which was accessible from the public highway, provided that the grantee might have the right to use in common with others as a pass-way a strip of land 11 feet wide, lying between the land conveyed and the grantor's land, so long as the same was used by the grantor for the same purpose: *Held*, that no easement was created by implication, and the pass-way might be closed as such, at the pleasure of the grantor of the land conveyed.—*Batchelder v. National State Capital Bank*, N. H., 22 Atl. Rep. 592.

34. EASEMENTS—Extinguishment.—The owner of an easement in a private crossing over a railroad running through his land agreed orally that, if the company would construct for him a new crossing, he would abandon his right to the old one. The company built the new crossing, and closed and destroyed the old one, without objection by the owner for several days: *Held*, that the easement was extinguished.—*Boston & P. R. v. Doherty*, Mass., 28 N. E. Rep. 277.

35. EJECTMENT—Equitable Title.—Under our system of practice, a plaintiff may allege and prove the facts showing himself the equitable owner of land, and thereupon recover the possession thereof as against the holder of the naked legal title or a stranger.—*Merrill v. Dearing*, Minn., 49 N. W. Rep. 693.

36. FRAUDS, STATUTE OF—Gift of Land.—A letter, wherein the writer promises to give a house to one whom he has treated as his son upon his marriage, does not take the promise out of the statute of frauds; and the fact that such son was put into possession of the house and lot, and remained in possession until the writer's death, does not constitute a valid defense to an action by the writer's executor to recover the property.—*Usher's Ex'r v. Flood*, Ky., 17 S. W. Rep. 132.

37. HOMESTEAD—Duration—Loss of Family.—Under Gen. St. Ky. ch. 38 art. 13, § 9, a debtor who has acquired a homestead does not lose his right to the exemption where he continues to occupy the property as a housekeeper though by reason of deaths and marriages he has no family living with him.—*Stults v. Sale*, Ky., 17 S. W. Rep. 148.

38. HOMESTEAD — Liability for Debts.—Under Civil Code Cal. § 1241, subd. 4, providing that the homestead is subject to sale in satisfaction of judgments obtained on debts secured by mortgage on the premises executed and recorded before the declaration of homestead was filed for record, an unrecorded contract for the purchase of real estate, given to the husband, and assigned by him as security for a debt, cannot be enforced by the assignee against the wife's recorded claim of homestead in the land, although it was afterwards paid for by the husband, and the title taken in her name.—*Ontario State Bank v. Gerry*, Cal., 27 Pac. Rep. 531.

39. HUSBAND AND WIFE—Separate Maintenance.—A wife slept away from her husband for a justifiable cause, but went to his home daily to attend to duties there. After finishing her work one day, she went to his father's house as usual, and on the following day filed a petition for support, under Pub. St. Mass. ch. 147, § 33, which provides that "when the wife for justifiable cause is actually living apart from her husband" the probate court may, on petition of the wife, make such order as it deems expedient concerning her support, etc: *Held*, sufficient to sustain a finding that the wife was living separate and apart from the husband at the time of filing the petition.—*Smith v. Smith*, Mass., 28 N. E. Rep. 263.

40. INSOLVENCY—Discharge—Release of Sureties.—Under the insolvent act of 1881, the discharge of the insolvent is a discharge by operation of law, and the execution of the formal release by a creditor in pursuance of the statute, as a condition of sharing in the assets, does not operate to release the sureties of the insolvent debtor.—*Ames v. Wilkinson*, Minn., 49 N. W. Rep. 696.

41. INSOLVENCY—Rights of Assignee—Stipulation on Appeal—Waiver.—Under Pub. St. Mass. ch. 151, § 2, cl. 11, and St. Mass. 1884, ch. 285, § 1, authorizing a bill in equity to reach property of a debtor which cannot be reached by attachment or execution at law, a bill brought to compel a member of a stock exchange to sell his certificate of membership, and satisfy plaintiff's claim from the proceeds, does not create a lien on the proceeds as against the debtor's subsequent assignee in insolvency, when the insolvency occurs while the suit is pending on appeal.—*Fish v. Fiske*, Mass., 28 N. E. Rep. 278.

42. INTERSTATE COMMERCE—Limited Tickets.—Where a railroad company has advertised one rate for unlimited first-class tickets between certain points and a less rate for limited first-class tickets between such points, it may sell at the latter rate tickets which, though not limited as to time of use, do not entitle the holder to the right to stop over at intermediate stations, as is allowed under the unlimited tickets, since the requirement that the ticket shall be used only for a continuous passage renders it a "limited ticket."—*United States v. Egan*, U. S. D. C. (Minn.), 47 Fed. Rep. 112.

43. INTOXICATING LIQUORS—Sale in Hotels.—An hotel is a "place," within the meaning of Pub. St. Mass. ch. 101, § 6, providing that "all buildings, places, or tenements used for the illegal keeping or sale of intoxicating liquor, shall be deemed common nuisances."—*Commonwealth v. Purcell*, Mass., 28 N. E. Rep. 268.

44. INTOXICATING LIQUORS — Sale in Original Packages.—Where liquor is shipped by non-residents to their agent in Boston, under a contract which he has made for its sale, and of which he has notified them, and the agent, upon its arrival, causes the liquor to be delivered to the purchasers, in the original packages in which it was shipped, an action is maintainable for the price, even though the importers did not have the license required by law to sell liquor in Boston.—*Carstairs v. O'Donnell*, Mass., 28 N. E. Rep. 271.

45. JUDGMENT — Collateral Attack. — A judgment in attachment on real property cannot be collaterally questioned by creditors of the defendant where it appears that the court rendering the judgment had obtained jurisdiction over the property.— *Needham v. Wilson*, U. S. C. C. (Colo.), 47 Fed. Rep. 97.

46. JUDGMENT—Confession.— Under sections 433 and 436 of the Civil Code, judgments by confession can only be entered by the debtor personally with the assent of the creditor, or by an attorney, who shall, at the time of making the confession, produce the warrant of attorney for making the same, the original or a copy to be filed with the clerk of the court in which judgment is entered.—*Howell v. Gilt-edge Manuf'g Co.*, Neb., 49 N. W. Rep. 704.

47. JUDICIAL SALE—Release of Purchaser.—An island in the Ohio river was sold under a chancellor's decree. The decree and advertisements described the land by metes and bounds. The description (taken from the patent) showed that the island contained 198 acres, when in fact it only contained 27 and three-fourth acres, and the boundary embraced the channel of the river: *Held*, proper to release the purchasers from liability on their bid.—*Pope v. Erdman*, Ky., 17 S. W. Rep. 145.

48. LIEN—Railroad—Enforcement. — Under a bill in equity to enforce a lien for work and labor performed on a railroad under the act of 1879 (chapter 3132, Laws Fla.), it is error to render a decree for a larger sum than is alleged in the bill to be due, and specially asked for in the prayer for relief.—*St. Johns & H. R. Co. v. Bartola*, Fla., 9 South. Rep. 853.

49. MALICIOUS PROSECUTION—Termination of Prosecution.—In an action for malicious prosecution of a civil action by attachment, the complaint does not state a cause of action, where it fails to allege that such attachment terminated in plaintiff's favor.—*Tisdale v. Kingman*, S. Car., 13 S. E. Rep. 547.

50. MASTER AND SERVANT—Defective Appliances.—It is not incumbent upon a master, who has caused a scaffold to be erected on which planks, suitable in quantity and quality, are laid to walk upon in the customary manner, without being fastened, to see to it that these planks are adjusted and in proper place at all times. The adjustment of such planks is incident to the service required of a servant who uses the same. —*Jennings v. Iron Bay Co.*, Minn., 49 N. W. Rep. 685.

51. MECHANIC'S LIEN.—Under Code Civil Proc. Cal. § 1183, which provides that material-men may have liens, and that all building contracts shall be in writing when the price exceeds $1,000, and shall be filed in the office of the county recorder before work is commenced, otherwise the contract to be void, and in such case all material furnished shall be deemed to have been furnished at the instance of the owner, a failure to give a description of the property affected by the contract does not invalidate it, as no description is required by statute.—*San Diego Lumber Co. v. Wooldredge*, Cal., 27 Pac. Rep. 431.

52. MECHANIC'S LIEN—Notice to Owner.—Under Code Civil Proc. Cal. § 1184, providing that a mechanic or material man may give the owner of the building for which he has furnished material or labor written notice of his claim, and that it thereupon becomes the duty of the owner to retain sufficient funds to pay it, a mechanic employed by a subcontractor, who serves the required notice, acquires a prior right to the fund in the hands of the owner due the contractor, though the latter may not be entitled to a lien, the building being a public one.—*Bates v. County of Santa Barbara*, Cal., 27 Pac. Rep. 438.

53. MECHANIC'S LIEN LAWS — Strict Construction.— Statutes authorizing mechanic's liens are in derogation of the common law, and must be strictly construed.— *Minor v. Marshall*, N. Mex., 27 Pac. Rep. 481.

54. MORTGAGES —Foreclosure. — The mortgage, the foreclosure of which by advertisement was herein involved, cannot be distinguished from those considered in Hull v. King, 38 Minn. 349, 37 N. W. Rep. 792, and Mason v. Goodnow, 41 Minn. 9, 42 N. W. Rep. 482, being in effect a separate and distinct mortgage upon each of 25 town lots. The notice of foreclosure proceeded against the lot in question and four others, as in default, and the amount claimed to be due and unpaid on the debt was stated in a gross sum; and the amount paid by the mortgagee as the taxes upon the five lots was also stated in gross: *Held*, that a sale under such a notice was unauthorized and invalid, without regard to the manner of sale, or the fact that each lot may have been sold separately, and for the exact amount due upon it.—*Bitzer v. Campbell*, Minn., 49 N. W. Rep. 691.

55. MORTGAGES—Liability of Mortgagee.—A mortgagee of real estate (the condition of defeasance not being recorded) exchanged the mortgaged premises for other real estate which was conveyed to him, and which he afterwards sold. In an accounting with the mortgagor, *held* that the mortgagee was chargeable (at the mortgagor's election) with the value of the land received in exchange for the mortgaged premises, even though the mortgagee did not realize its full value upon selling it.—*Darling v. Harmon*, Minn., 49 N. W. Rep. 686.

56. MORTGAGES — Non-payment of Interest.—A provision of a mortgage note that, upon default in the payment of interest, the whole sum of principal and interest shall immediately become due and payable, at the holder's election, is an absolute agreement of the makers, depending solely upon such election, and does not require the giving of notice before suit to foreclose. —*Hewitt v. Dean*, Cal., 27 Pac. Rep. 423.

57. MUNICIPAL BONDS — Street Assessments.—Const. Wash. art. 7, providing that "taxes shall be equal and uniform and according to the value," does not include local assessments for street improvements; and Charter City of Seattle, art. 8, § 7, providing that the cost for improving streets shall be met by assessments levied upon the abutting property according to the front foot, is not unconstitutional.—*Austin v. City of Seattle*, Wash., 27 Pac. Rep. 557.

58. MUNICIPAL BONDS — Validity — Estoppel.—Where county bonds are issued in excess of the constitutional limit of indebtedness, a recital in the bonds that they are issued by virtue of a legislative act which recites the constitutional limitation, and that all the provisions of that act have been fully complied with, does not estop the county from denying the validity of the bonds.—*Sutliff v. Lake County*, U. S. C. C. (Colo.), 47 Fed. Rep. 106.

59. MUNICIPAL CORPORATIONS— Mandatory Statute.— There is no universal rule by which directory words in a statute may, under all circumstances, be distinguished from those which are mandatory; but it may be stated, generally, that whenever the public interests or individual rights call for the exercise of a power which has been given to public officers to perform, the language used in conferring the power, although permissive in form, is, in effect, imperative.—*Bowen v. City of Minneapolis*, Minn., 49 N. W. Rep. 683.

60. MUNICIPAL CORPORATIONS — Ordinances. — Const. Cal. art. 14, requires cities to regulate water-rates by ordinance. Ordinance Los Angeles, Feb. 1890, § 1, fixes certain specific rates for the use of water according to the size of the house, etc. Section 2 provides that, where there is a large consumption or waste of water, the person or corporation furnishing it may apply a meter, and collect a certain amount for certain quantities of water used: *Held*, that the ordinance was not invalid, in that it fixed different rates for consumers of the same class.—*Steward v. Citizens' Water Co.*, 27 Pac. Rep. 439.

61. MUNICIPAL CORPORATIONS—Power to Issue Bonds. —Street improvement bonds, issued under Laws Wash. T. 1885, 86, p. 241, allowing the city of Seattle to create local assessment districts upon the property within which a special levy could be laid to pay for the entire expense, and in pursuance of an agreement with the contractor that he should be paid "out of a special fund" by warrants showing on their face that they are

so payable, create a liability payable out of a particular fund, and not out of the treasury generally.—*Baker v. City of Seattle*, Wash., 27 Pac. Rep. 462.

62. MUNICIPAL CORPORATIONS—Street Improvements.—Act. Cal. March 18, 1885, § 5, relating to street improvements, provides that after contracts have been awarded notice thereof shall be posted for 5 days, and that within 10 days from the first posting, if the owners of the major part of the frontage on the street where work is to be done shall elect to take the work at the price awarded, and shall enter into a contract to that effect, they shall have the work; but if they do not so elect, the street superintendent shall contract the work to the one to whom it was awarded: *Held*, that the superintendent had no authority to contract with the one to whom it had been awarded until after 10 days from the first posting of the notice of award.—*Manning v. Den*, Cal., 27 Pac. Rep. 435.

63. NEGLIGENCE—Liability of Ship-owners.—Under Act Cong. Aug. 2, 1882, which provides that steam-ships shall carry competent surgeons, who shall be supplied with proper instruments and medicines, etc., it is the duty of the ship-owner to provide a competent surgeon, who may be employed by the passengers if they choose; but the owner is not liable for injury caused by failure of the surgeon to exercise care in performing a surgical operation.—*O'Brien v. Cunard S. S. Co.*, Mass., 28 N. E. Rep. 266.

64. PARTNERSHIP—Accounting.—A person who, on buying the interest of certain members of a mining firm, informs the remaining partner that he will no longer carry on the partnership operations, nor be liable for debts contracted thereafter in its behalf, is not liable to such partner for any subsequent expenses incurred by him in developing the mine.—*Galligher v. Lockhart*, Mont., 27 Pac. Rep. 446.

65. PRACTICE—Concurrent Remedy at Law and Equity.—A bill in equity, to subject to the payment of plaintiff's claim property fraudulently transferred by defendant, may be used instead of an attachment, under Pub. St. Mass. ch. 151, § 3, providing that the court shall also have jurisdiction in equity to reach and apply in payment any property of a debtor liable to be attached in a suit at law against him and conveyed by him with intent to defraud his creditors.—*Stratton v. Hernon*, Mass., 28 N. E. Rep. 269.

66. PRINCIPAL AND SURETY—Rights against Co-Sureties.—One who has become surety at the request of cosureties, and upon assurances made by them at the time that he would be saved harmless, and would not have the debt to pay, may proceed in equity without first resorting to a court of law to compel said cosureties to discharge whatever sum he has become bound to pay on account of said suretyship.—*Hayden v. Thrasher*, Fla., 9 South. Rep. 855.

67. PROBATE AND DISTRICT COURTS—Equitable Jurisdiction.—Organic Act N. M. § 10, provides that the judicial power shall be vested in a supreme court, district courts, probate courts, and justices of the peace, and that the jurisdictions of the several courts, "shall be as limited by law." *Held*, that the act does not confer chancery jurisdiction on probate courts.—*Garcia Y Perea v. Barela*, N. Mex., 27 Pac. Rep. 507.

68. PROHIBITION—When Granted.—The fact that a district court has overruled a motion to dissolve a preliminary injunction against certain State officers, prohibiting them from paying money to certain institutions under an act of the legislature, which motion challenged the jurisdiction of the court over the subject-matter, and is about to hear the cause on its merits, will not authorize a writ of prohibition, as the ruling may be reviewed on appeal.—*State v. Jones*, Wash., 27 Pac. Rep. 452.

69. PROHIBITION—When Issued.—Where a court having jurisdiction of the subject-matter ordered service of summons by publication defendant was not entitled to a writ of prohibition to stay proceedings until he should enter a general appearance or be personally served with summons, appeal from the judgment being the proper remedy.—*Mines d'Or de Quartz Mountain Societe Anonyme v. Superior Court of Fresno County*, Cal., 27 Pac. Rep. 532.

70. PUBLIC LANDS—Oregon Donation Act.—Act. Cong. Sept. 27, 1850, § 4, (9, St. U. S. ch. 76, p. 497), granted to every white settler of the public land, over 18 years of age and a citizen of the United States, who was then a resident of Oregon, or who should become a resident on or before December 1, 1850, and who should reside upon and cultivate it for four consecutive years, 320 acres if a single man, or 640 acres if married, or being married within one year from December 1, 1850, one half to himself and one half to his wife in her own right. *Held*, that a married man who became a resident prior to December 1, 1850, and settled on the land in April, 1852, lost his right to claim 640 acres, upon being subsequently divorced, and that his second marriage, in January, 1853, did not restore it.—*McSorley v. Hill*, Wash., 27 Pac. Rep. 562.

71. PUBLIC LANDS—Tide lands.—Act. Cong. 1872, (17 St. at Large 649), providing for the relief of one Valentine, authorizes the selection by the holder of the Valentine scrip of unoccupied and unappropriated public lands. Plaintiff, as owner of Valentine scrip E, No. 199, brought ejectment to recover certain lands, being portions of the tide flats in Elliot bay, which are covered at ordinary high tide, and uncovered at ordinary low tide, over which defendant had erected a foundry and machine-shop. Plaintiff had selected the lands at a time when they were unoccupied. *Held*, that the complaint was properly dismissed, since the premises are "water," and not "land" subject to entry under the statute.—*Baer v. Moran Bros. Co.*, Wash., 27 Pac. Rep. 470.

72. QUO WARRANTO—Procedure.—Code Wash. § 703, relating to *quo warranto* proceedings, provides that the information may be filed by the prosecuting attorney, or by any other person on his own relation whenever he claims an interest in the office, franchise, or corporation which is the subject of the information: *Held*, that the mayor of a city has not such an interest in the office of councilman as to entitle him to maintain, on his own relation, *quo warranto* to oust an alleged usurper of such office; but the usurpation affects the public alike, and the remedy is by proceedings on the part of the State.—*State v. Mills*, Wash., 27 Pac. Rep. 560.

73. RAILROAD COMPANIES—Construction of Road—Damages.—In an action by the owner of abutting property against the company for damage to the freehold and for diminishing the annual value of the premises for use there can be no recovery as to the freehold where the market value has been increased, but as to the latter there may be a recovery, notwithstanding such increase in the market value. A wrong-doer cannot set off increase of market value, caused by his wrongful act, against loss of rents and profits occasioned thereby.—*Davis v. East Tennessee, V. & G. Ry. Co.*, Ga., 13 S. E. Rep. 567.

74. RAILROAD COMPANIES—Trespasser—Contributory Negligence.—In an action against a railroad company by one who was struck by a train while walking along the track, it appeared that plaintiff was familiar with the ground, and knew that engines frequently passed over it at all hours: that he walked along the track for some distance without looking back; and that he could have seen and heard the approaching train if he had looked and listened. *Held*, that he was guilty of contributory negligence and could not recover.—*Candelaria v. Atchison, T. & S. F. R. Co.*, N. Mex., 27 Pac. Rep. 497.

75. RAILROAD COMPANIES—Death of Employees.—In an action against a railroad company for the death of an employee, plaintiff's husband, where the complaint is in the name of plaintiff "as administratrix" of deceased, and in the body of the complaint the deceased is referred to as "plaintiff's intestate," the representative capacity of plaintiff sufficiently appears to enable her to maintain the action under Code Ala. § 2591, which gives the right of action to personal representatives only.—*Louisville & N. R. Co. v. Trammell*, Ala., 9 South. Rep. 870

76. RAILROAD COMPANIES — Injuries to Persons on Track.—Plaintiff came to defendant's railroad station, intending to take a train. There were several tracks, and the train he intended to take stood on the further track from where plaintiff approached the station. The platform gates on the side nearest plaintiff were closed, and he passed the gate on the sidewalk, crossing the near track diagonally, intending to go round the train, and reach the platform on the further side. While crossing the near track he was struck by an approaching train. A dense smoke was hanging over the track, and the engine which struck him had no headlight, though it was getting dark. *Held*, that plaintiff was negligent.—*Debbins v. Old Colony R. Co.*, Mass., 28 N. E. Rep. 560.

77. RAILROAD COMPANIES—Warehousmen.—On failure of the owner of baggage to remove the same from a depot after a reasonable opportunity, the company acquires the capacity of a warehousman, and is liable only for lack of ordinary care; and where a passenger, on arrival at her destination, left her trunk, for convenience and economy, at the station, though with the agent's consent, but took a small portion of the contents there of with her, the company's liability as carrier ceased, and that as warehouseman began.—*Galveston, H. & S. A. Ry. Co. v. Smith*, Tex, 17 S. W. Rep. 133.

78. RELEASE AND DISCHARGE—Promissory Notes.—A note secured by chattel mortgage was made payable at a bank, and afterwards indorsed, and the security made over to the bank. The maker sold to a third party his equity in the property mortgaged, and the bank agreed with the maker to look to the property alone if he chose to refrain from paying the note, and from taking steps to secure payment out of the property. The property was of sufficient value to pay the note at maturity, but the bank extended the time for payment, without the knowledge or request of the maker. When the property had depreciated in value, it was sold under foreclosure, and the proceeds indorsed on the note. *Held*, that the agreement with the bank released the maker from liability on the note, and could be shown as a defense to an action thereon.—*First Nat. Bank v. Watkins*, Mass., 28 N. E. Rep. 276.

79. RESCISSION.—Plaintiff agreed with one N and wife to exchange lands, and advanced $500 of the purchase price. N gave a receipt for the money, and indorsed thereon: "Trade to be finished within two weeks from this date, or this deposit to forfeited without recourse. Title to prove good, or no sale, and this deposit to be returned." An attachment against plaintiff's husband had been levied on her property, which she refused to procure discharged. N abandoned the trade, and returned the money to defendants, who had negotiated the exchange of lands for N. *Held*, that the deposit remained in the hands of defendants as money had and received to plaintiff's use.—*Phelps v. Brown*, Cal., 27 Pac. Rep. 420.

80. SALE—Rescission—Order by Mail.—In an action for the price of goods ordered by mail and burned in the house of the buyer, the disputed question of fact being whether the goods were of the kind ordered, the buyer cannot complain of a charge that, if a buyer receives the goods he has ordered, and does not wish to accept them, he must return them immediately, and, if he retains them without an order to do so from the seller, he is liable for them.—*Cerf v. Badaraco*, N. Mex., 27 Pac. Rep. 504.

81. SALE—Warranty.—In an action upon a note given for a harvester, where certain defects were alleged in violation of a verbal warranty, *held*, that the evidence failed to establish a verbal warranty, or that the machine was materially defective. — *McCormick Harvesting Mach. Co. v. Martin*, Neb., 49 N. W. Rep. 700.

82. SALE—Warranty—Damages.—Where, in an action to recover for fire-brick sold, a counter-claim is filed, alleging a breach of warranty, and the evidence shows that the brick were ordered for the purpose of building coke-ovens, as plaintiffs well knew; that many of them were worthless, and that they soon melted and fell in—it is error to instruct that, if there was a breach of warranty the plaintiffs would only be liable for the difference in the price of the brick as represented and their value as they really were, together with such damages as were immediate consequences of such breach; but that if defendant had an opportunity to inspect the brick before use, and did not do so, and if upon inspection it could have discovered the defects claimed, then defendant was not entitled to damages.—*Tacomo Coal Co. v. Bradley*, Wash., 27 Pac. Rep. 454.

83. SLANDER—Evidence—Mitigation of Damages.—In an action for slander, evidence that the defamatory statements made by defendant were common reports in the place where plaintiff formerly lived is inadmissible in mitigation of damages.—*Preston v. Frey*, Cal., 27 Pac. Rep. 533.

84. SLANDER OF TITLE—When Action Lies.—An averment that a certain person offered to buy plaintiff's land, and that the offer was accepted, but that, after the purchaser was informed of the false statements of another regarding the title, he was "deterred from carrying out his agreement," indicates that there was a valid contract enforceable against the purchaser; and no action, therefore, is maintainable for the slander.—*Burkett v. Griffith*, Cal., 27 Pac. Rep. 527.

85. SPECIFIC PERFORMANCE — Contract. — Defendant offered to buy plaintiffs' street railroad at an agreed price, "offer based on a clear title." Plaintiffs prepared an agreement to be signed, and forwarded it to defendant, the title to be examined "before signing the agreement." Defendant's attorney objected to the title, and defendant notified plaintiffs thereof, who thought the title good, and wished to know what defendant would "finally conclude to do." Defendant refused to purchase: *Held*, that there was no such concluded contract as could be specifically enforced.—*Pacific Rolling mill Co. v. Riverside & A. Ry. Co.*, Cal., 27 Pac. Rep. 525.

86. SPECIFIC PERFORMANCE—Mutuality of Remedy.—An agreement to convey land in consideration of the vendee building a dummy railroad through and by the vendor's premises, and operating the same for a period of 10 years, fare not to exceed a certain sum, cannot be enforced until the vendee has performed his part of the agreement by operating the road for the time specified, and at the fixed rate; since Civil Code Cal. § 3386, provides that "neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation."—*Lattin v. Hazard*, Cal., 27 Pac. Rep. 515.

87. TRIAL—Impaneling Juries.—Laws N. M. 1889, p. 227, provides for the selecting of two different jurors,—one to serve on the part of the United States, for the district, who are to be paid by the United States, and one to serve on the part of the territory for the county, who are to be paid by the territory: *Held*, that the act regulating the impaneling of grand and petit juries to investigate and try causes on the part of the United States is not special legislation, since it applies to the impaneling of juries in every district in the territory.—*United States v. De Amador*, N. Mex., 27 Pac. Rep. 488.

88. TRIAL—Jurors.—On the trial of one R for felony, while the jury was being impaneled, the court made an order as follows: "The court orders the defendant to exercise his first three peremptory challenges before the panel is filled,"—to which exceptions were taken: *Held*, an undue exercise of power prejudicial to the accused.—*Rutherford v. State*, Neb., 49 N. W Rep. 701.

89. TRUST—Enforcement — Incorporation of Beneficiaries.—Where money has been given, or goods for the purpose of being converted into money, by a community at large to different unincorporated associations of individuals for the purpose of purchasing land and erecting a hall thereon for the common benefit of such associations, which moneys are placed in the hands of certain members of said associations for that purpose, who purchase land with buildings thereon, taking the title in trust for such associations, after which all of said associations become incorporated according to

law for the purpose of more effectually protecting and carrying out the purposes and interests of such associations, such corporation has the right to demand and receive from the persons so holding the title a conveyance thereof to it, without any formal request from the different associations.—*Organized Labor Hall v. Gebert*, N. J., 22 Atl. Rep. 578.

90. TRUST — Parol Trust. — While a trust in lands, created by parol, must, in an attempt to enforce the trust, be manifested by writing duly signed, it is competent, after the trust has been terminated by a conveyance of the property by the trustee, to prove the trust by parol evidence.—*Silvers v. Potter*, N. J., 22 Atl. Rep. 584.

91. TRUST IN LAND—How Created.—A daughter gave her father an absolute deed to lands, and the next day made a writing intended as a will, but which was void for irregularity, declaring that she deeded the land to her father for certain purposes therein stated. In a subsequent action concerning the land, the father filed a verified answer, averring that the land was conveyed to him in trust: *Held*, that this answer was sufficient to satisfy Civil Code Cal. § 852, which provides that no trust in relation to land is valid unless created or declared by a written instrument signed by the trustee.—*Garnsey v. Gothard*, Cal., 27 Pac. Rep. 516.

92. VENDOR AND VENDEE—Rescission of Contract.—The plaintiff, a resident of the city of St. Paul, was induced to purchase certain improved real property in the city of New York, of defendant, in reliance upon certain written representations made by him respecting its value, character, and situation, and which representations in several important particulars the plaintiff soon after found to be untrue, so that he was entitled to a rescission of the sale, if seasonably demanded. He, however, delayed for six months thereafter to demand a rescission of the sale, dealing with it as his own, and endeavoring to dispose thereof: *Held*, that he must be deemed to have waived his right to rescind, and to have made his election to keep the property.—*Marshall v. Gilman*, Minn., 49 N. W. Rep. 688.

93. VENDOR AND VENDEE—Vendor's Lien.—In an action to foreclose a vendor's lien, it appeared that the contract for the sale of the land provided that defendants should pay a certain amount down, and the balance of the purchase price in two installments, due, respectively, on or before May 1, 1888, and on or before November 1, 1888, with a further provision that, "time being of the essence of this contract," a failure of defendants to comply therewith operates as a forfeiture of all their payments and rights thereunder. February 7, 1889, plaintiff tendered a deed, and demanded payment of the unpaid installments, which was refused: *Held*, that plaintiff was not in default in not tendering a deed November 1, 1888, and was entitled to judgment.—*Newton v. Hull*, Cal., 27 Pac. Rep. 429.

94. WATER-COURSES.—A right established by contract to back water in a stream to the height which an existing dam would raise it does not necessarily confer a right to back the water as a subsequent dam, located higher up the stream, will back it, although the top of the subsequent dam may be on a level with the top of the former dam. The width of the two dams, and the conformation of the land on the shore lines, may cause inequality in the effect of the dams in backing the water.—*Stafford v. Maddox*, Ga., 13 S. E. Rep. 559.

95. WATER-RIGHTS—Reservation in Deed.—A land and water company conveyed a tract of land through which ran a ditch, reserving the ditch and a strip of land 10 feet wide on each side of it; also the right to enter on the lands for the purpose of making repairs, and to tunnel or in any manner develop the waters on the lands. The reservation provided that the grantees were not to use any of the water in the ditch, nor use any water on the land, except for the purpose of irrigation and for domestic use: *Held*, that the reservation included about an acre of water-bearing land which was in the tract, and the undeveloped water therein, less the quantity required to irrigate the tract and for domestic use.—*Painter v. Pasadena Land & Water Co.*, Cal., 27 Pac. Rep. 539.

96. WATERS—Riparian Rights—Conveyance of Shore-land.—The riparian right of the owner of lands on the shore of navigable water, as on our great lakes, to reclaim, improve, and occupy the land submerged by shallow water, beyond the shore, may be disassociated from the shore-land by the act of the owner, so that a conveyance by him of the shore land would not include such riparian rights as incident thereto.—*Gilbert v. Eldridge*, Minn., 49 N. W. Rep. 679.

97. WATERS—Riparian Rights—Tide-lands.—A littoral land-owner cannot assert title to land lying below the line of ordinary high tide, as against the State, in the absence of a license from the State.—*State v. Prosser*, Wash., 27 Pac. Rep. 550.

98. WATERS AND WATER-COURSES — Grants.—A deed from Plymouth Colony, dated March 5, 1680, conveyed as private property to private individuals a large tract of land, known as the "Pocasset Grant," including the whole of one great pond and part of another. The *habendum* covered "all the above mentioned and bounded lands, with all and singular the woods, waters, coves, creeks, ponds, brooks, benefits, profits, privileges, and hereditaments" thereto belonging: *Held*, that said ponds were included in the grant, even though they were not mentioned in the granting clause.—*Watuppa Reservoir Co. v. City of Fall River*, Mass., 28 N. Rep. 257.

99. WEIGHTS AND MEASURES.—The Code, § 1589, requires all persons engaged in selling by weights and measures to have the same properly marked by the ordinary, and declares that in default thereof they shall not collect any account, note, or other writing, the consideration of which is any commodity sold by their weights and measures. Whether, under this provision, taken in connection with section 2745 of the Code, the note and mortgage are void only for so much of their consideration as arose from sales of goods weighed and measured by unmarked instruments, or for the whole amount thereof, some of the consideration being other dealings, was not decided by the court below, and is left an open question for determination in this case on the new trial.—*Finch v. Barclay*, Ga., 13 S. E. Rep. 566.

100. WILLS—Construction. — A mother died, leaving her estate in trust for her daughters. The will gave each daughter the right to dispose of her interest by will, in the event that she should die without issue her surviving. The will also provided that, "at the decease of my children, the estate in the hands of the trustees shall be divided into shares equal in number to the number of my grandchildren then living, and one share shall thereafter be held in trust for each grandchild:" *Held*, that the former provision should control, and the will of a daughter having no issue was valid.—*Olney v. Balch*, Mass., 28 N. E. Rep. 258.

101. WILLS — Construction. — The blending of the residue of the real and personal estate in the residuary clause of a will after pecuniary legacies implies an intention on the part of testator to charge the legacies on such real estate if the personal estate is not sufficient, and this implication will prevail, unless such construction is restrained or avoided by other words or provisions in the will.—*Turner v. Gibb*, N. J., 22 Atl. Rep. 580.

102. WILLS—Construction—Contingent Remainder.—A will provided that all the testator's property should go to his wife for life; in the event she married again, and left a child or children surviving her, then the property to go to such child or children; if the wife died without issue, then the property to go to the testator's brothers, and sisters, and to the children of such as might be dead: *Held*, that the brothers and sisters took a contingent remainder, which did not vest until the death of testator's widow without issue; and, where a brother died without issue before the testator's widow, such contingency died with him, and his widow could not share in the estate.—*Lepps v. Lee*, Ky., 17 S. W. Rep. 146.